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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF COLORADO,
Petitioner,

v.

FRANCIS BARRY CONNELLY,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER*

INTEREST OF *AMICUS CURIAE*

The American Psychological Association (hereafter "APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. APA wishes to inform the Court about the extent to which behavioral scientists, including psychologists, can provide meaningful expert assistance in evaluating the cognitive and volitional capacities of criminal defendants. APA believes this important and relevant information will not be provided by the parties and will be of assistance to the Court in deciding this case.

Petitioner and respondent have both consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case presents questions of first impression in this Court involving the validity of confessions and of waivers of *Miranda* rights by an individual diagnosed as a paranoid schizophrenic acting in response to "command hallucinations." Specifically, the questions presented are whether, absent any claim of police misconduct, the state's use of spontaneous but incriminating statements made in a noncustodial setting by a paranoid schizophrenic acting in response to an auditory hallucination commanding him to confess, or its use of incriminating

* *Amicus* wishes to acknowledge substantial assistance in the research and preparation of this brief from Brendan A. Maher, Ph.D., Henderson Professor of the Psychology of Personality, Harvard University.

statements made subsequently by that individual in a custodial setting following a "waiver" of his *Miranda* rights, would violate the due process clause of the Fourteenth Amendment.

As discussed *infra*, Point V, in evaluating the constitutional admissibility of confessions, or the validity of waivers of *Miranda* rights, the Court has articulated a standard which, though variously phrased, requires assessment of the individual's cognitive *and* volitional capacities at the time of the confession or waiver.

The behavioral sciences, including, in particular, psychology, *can* provide meaningful assistance to the legal system in assessing individuals' cognitive capacities. Specifically, psychologists and other behavioral scientists can evaluate the effect or lack of effect of paranoid schizophrenia, and of command hallucinations, on a particular individual's cognitive capacity. Point I.A. However, because behavioral science is based on the premise that all behavior is determined, "volition" is not used or recognized by the behavioral sciences as a meaningful concept in the study of human behavior. Accordingly, the behavioral sciences can provide only very limited assistance to the legal system ir assessing the effects of paranoid schizophrenia or of command hallucinations on individuals' volitional capacities. Specifically, psychologists and other behavioral scientists can provide the legal system with *statistical* evidence of the percentage of individuals receiving command hallucinations who obey or disobey the commard. But they cannot predict whether a particular individual will obey or disobey a command hallucination. Point I.B.

Although command hallucinations are relatively common, the professional literature contains only a few references to the cognitive capacity of persons who receive and obey command hallucinations. Those references indicate, however, that the cognitive capacity of individuals who obey command hallucinations is likely to be relatively intact. It can at least be said that most individ-

uals who receive and obey command hallucinations are able to understand what they are doing, and to understand the consequences of their acts. This conclusion is consistent with the expert testimony that respondent's cognitive capacity was not impaired. Point II.

Not surprisingly, the professional literature contains no references, *per se*, to the volitional capacity of individuals who obey or disobey command hallucinations. However, based on clinical experience, it can be said that it is rare for individuals who receive command hallucinations to obey them, and extremely rare for individuals to obey command hallucinations when to do so will cause them physical harm or other significant injury. In this statistical sense, it appears that most individuals can, and do, resist auditory hallucinations commanding them to commit acts that would be physically or otherwise injurious to themselves.

Nevertheless, except perhaps in controlled, experimental conditions, which were not present in this case, psychologists and other behavioral scientists cannot determine the effect of a particular command hallucination on the behavior of a particular individual. Accordingly, when the expert testified that respondent's command hallucinations impaired his volitional capacity, he was expressing a personal opinion, not an opinion based on generally accepted and reliable scientific evidence. Point III.

Amicus believes that, in the circumstances of this case, the state's use of respondent's spontaneous precustodial confession or of the statements he made after being advised of his *Miranda* rights would not violate the due process clause. Because respondent apparently does not contest the trustworthiness of his confessions, or claim they were the result of improper official conduct, suppression of those confessions is not necessary to further either of the values protected by the due process clause in this context. Point IV.

Amicus concludes by recommending clarifications of the existing legal tests that would facilitate meaningful participation by psychologists and other behavioral scientists in evaluating individuals pursuant to those tests. Point V.

ARGUMENT

I. ALTHOUGH THE BEHAVIORAL SCIENCES CAN PROVIDE MEANINGFUL ASSISTANCE TO THE LEGAL SYSTEM IN EVALUATING INDIVIDUALS' COGNITIVE CAPACITIES, BECAUSE OF FUNDAMENTAL DIFFERENCES BETWEEN THE ASSUMPTIONS UNDERLYING THE BEHAVIORAL SCIENCES AND THE LEGAL SYSTEM, THE BEHAVIORAL SCIENCES CAN PROVIDE ONLY LIMITED ASSISTANCE TO THE LEGAL SYSTEM IN EVALUATING INDIVIDUALS' VOLITIONAL CAPACITIES.

The civil and criminal legal systems assume that, absent undue coercion, mentally healthy adults can "choose" to engage or not engage in various behaviors, or otherwise exercise "free will." Legal concepts of blameworthiness and personal responsibility depend on these assumptions.

Science relies on very different assumptions. Among the fundamental assumptions of every science (including psychology) is the assumption that the events studied in that science occur pursuant to "natural laws." Natural laws are different from man-made laws. Although man-made laws can be violated, natural laws cannot. They are assumed to be unbreakable.[1] This natural law assumption means that when any event occurs it does so because a

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[1] See F. CARPENTER, THE SKINNER PRIMER: BEYOND FREEDOM AND DIGNITY 101 (1974):

> Man-made laws are violable; that is, they can be disobeyed. A natural law, however, such as the law of gravity, applies to all material things; it cannot be broken. Man-made laws can be broken either through ignorance of them or by deliberate action. Thus, any violable law implies a freedom, the freedom to break it.

combination of antecedent events or stimulus conditions ("causes") had made that event inevitable.[2] No event occurs in defiance of natural law (if this should occur it would, by definition, be a miracle).[3] Thus, whenever anything happens, it could not have been possible, from a scientific point of view, for it to have failed to happen, or for it to have happened in any other way. Similar responses may be evoked by different combinations of stimulus conditions, but if that particular combination of conditions were to occur again, an identical response would necessarily occur again.[4] This natural law assumption is accepted by behavioral science, and is the premise on

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[2] An event that does not directly evoke planned, desired or particular behavior is called an antecedent event. An event that does evoke particular behavior is called a stimulus. The behavior that results from a stimulus is called a response. M. TILLMAN, D. BERSOFF & T. DOLLY, LEARNING TO TEACH 125-126 (1976).

[3] Similarly, from a scientific point of view, statements that something happened "by accident," or "by chance" mean only that we do not know the full range of antecedent events that determined the event. References to "accident" or "chance," do not describe a special kind of cause, nor do they mean that something can happen without any cause; they simply indicate that we are ignorant of the actual factors that made the event inevitable.

[4] The principle that events occur pursuant to unbreakable natural laws means, in theory, that future events can be predicted based upon knowledge of antecedent events. This does not mean, however, that responses are necessarily predictable in practice. A major obstacle to actual prediction of a specific response is lack of complete information about all of the antecedent events. Another obstacle is Heisenberg's principle of indeterminacy, which states that a phenomenon or circumstance is changed by the very act of perceiving it. For this reason, "Heisenberg demonstrated that we never possess [and can never possess] more than half of the information necessary to predict the future action of an electron in an atomic orbit. . . . It is not a question of a basic limitation due to our methods of measurement or to our senses; it is a basic limitation resting on the reciprocal interaction of observation and phenomenon." LECOMTE DU NOUY, THE ROAD TO REASON 175-176 (1948).

which psychologists and other behavioral scientists base their claims to reliable knowledge about behavior.[5]

A. Volitional Capacity

Behavioral science does not use terms such as "volition," or "free will." Behavioral scientists assume that any action by living creatures, including humans, is the inevitable outcome of a set of antecedent and stimulus conditions. When individuals are placed in a situation in which several alternative courses of action are ostensibly open to them, their "choice" will be determined by the relative weight of the various antecedent and stimulus conditions that are relevant to each of the alternatives.

A second basic assumption of behavioral science is that "choices" are determined by the consequences the individual has experienced, or has observed others to experience, following similar behavior in the past. The probability that particular behavior will occur again increases when that behavior is followed by a positive (or reinforcing) consequence, or by a reduction of a negative consequence (such as pain or guilt). The probability that particular behavior will not occur again increases when that be-

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[5] The analysis presented in this brief is based on a relatively "pure" model of behavioral science, in which all behavior is determined and there is no room for concepts such as "voluntary," or "free will." From a strictly scientific perspective, no less deterministic model is possible. However, *amicus* wishes to acknowledge that just as the law has found it necessary, in practice, to rely on concepts such as "voluntary," and "free will," it is also true that, in practice, behavioral scientists sometimes rely on similar concepts, even though such concepts are inconsistent with a strictly deterministic model. Behavioral scientists are scientists, but they are also people, and like all people their actions and relationships with others are frequently based on assumptions of personal autonomy, responsibility, and free choice that would be inconsistent with a strictly deterministic model. Similarly, concepts of autonomy and choice play a prominent role in the *professional* work of distinguished behavioral scientists. *E.g.*, R. FADEN & T. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986) (*see especially*, Chapter 7, "The Concept of Autonomy," and Chapter 10, "Coercion, Manipulation and Persuasion").

havior is followed by a negative consequence, or by no apparent consequence. This means behavioral science assumes that no individual is "free" to ignore that individual's "reinforcement history" and to "choose" the more negative consequence, any more than a falling apple is free to stop in mid-air. Different individuals do make different choices in what *appear* to be similar or identical circumstances, but that is because they have different genetic endowments and have had different environmental experiences which cause them to evaluate the positive or negative consequences of the current circumstances quite differently.[6]

From this behavioral science point of view, the difference between mental disorder and normalcy is not a difference between "determined" behavior and "free" behavior. Both kinds of behavior are "determined," as is all behavior. The behavior of mentally disordered persons is simply determined by different antecedents (perhaps genetic, perhaps physiological, or perhaps environmental) from the antecedents that determine the behavior of normal persons.

Applying these principles to this case, the behavioral scientist must assume that a particular complex of factors (some of which can only be guessed) made it inevitable that respondent would confess when he did. The scientist might guess that a religious background in which respondent was taught that confession is necessary if sin is to be forgiven, together with respondent's discomfort arising from guilt and fear of apprehension, created a situation in which confessing was less negative to respondent than was continued concealment. Presumably, individuals who confess to crimes because their "conscience is bothering them" have found, as a result of their reinforcement history, that the distress caused by concealment is more

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[6] The effects of past experience cannot be "willed" away. They can be changed by new experiences, but they cannot be changed by the action of some agency outside the cause-and-effect chain, popularly known as "free will."

aversive (unpleasant) than the anticipated consequences of confession. It is determined that they will engage in the behavior with the more positive consequences or the lesser discomfort, which, for those individuals, means confessing. Because they were not free to choose the greater discomfort, it cannot be said that their confessions were "voluntary" or an exercise of "free will."

Thus, in this sense, no behavioral scientist could express a professional opinion that respondent's precustodial and post-*Miranda* confessions were "voluntary" or were an exercise of "free will." Respondent's behavior was determined and he had no "choice" to do other than what he did. In reaching that conclusion, however, psychologists and other behavioral scientists could not assert (indeed, it would be unscientific to do so) that respondent's "will" had been overborne.[7]

Strictly speaking, the concept of coercion (insofar as it means acting under conditions that prevent "voluntary" action or the operation of "free will") has no meaning in behavioral science. A behavioral scientist can speak meaningfully of situations that have forcible constraints which effectively limit the range of behaviors engaged in by most people. Some of these constraints may be of a purely material nature, and may effectively constrain

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[7] *E.g.*, B. SKINNER, BEYOND FREEDOM AND DIGNITY 96 (1971):

> In what we may call the prescientific [or legal] view (and the word is not necessarily pejorative) a person's behavior is at least to some extent his own achievement. He is free to deliberate, decide, and act, possibly in original ways, and he is to be given credit for his successes and blamed for his failures. In the scientific view (and the word is not necessarily honorific) a person's behavior is determined by a genetic endowment traceable to the evolutionary history of the species and by the environmental circumstances to which as an individual he has been exposed. Neither view can be proved, but it is in the nature of scientific inquiry that the evidence should shift in favor of the second. As we learn more about the effects of the environment, we have less reason to attribute any part of human behavior to an autonomous controlling agent.

everyone, regardless of their differing antecedent experiences. Physical confinement, for example, would effectively limit every confined person's range of behaviors. But non-physical constraints can also limit the range of possible behaviors for most people. And some non-physical constraints may limit the range of possible behaviors almost as effectively as physical restraints.

If empirical evidence shows that the great majority of people subjected to a particular non-physical constraint exhibit a very limited range of behaviors, even though other behaviors were physically possible, it can be said that that is an effective constraint. For example, the bank teller commanded to hand over the contents of the till at pistol point is, strictly speaking, "free" to ignore that command and to risk the consequences. But because we know, empirically, that most bank tellers obey such commands, we regard the pistol point command as coercive. In this sense of the word, a behavioral scientist can properly describe the pistol point command as a "coercive" stimulus, because it produces *statistical* restriction in the range of behaviors that *most* people show in its presence. Of course, a few tellers would disobey the pistol point command. Some might scream. Others might push an alarm button, struggle with the robber, or simply freeze. Each of those behaviors would have been determined by the different antecedent events and reinforcement history of each teller's life experiences. The behaviors of tellers who *obey* the pistol point command would also have been determined by the different antecedent events and reinforcement history of their lives. Thus, when behavioral scientists say that a particular stimulus was coercive, they mean only that that stimulus, combined with the antecedent circumstances and reinforcement histories that are, by inference, common in most people's lives, would curtail the range of possible behaviors most people would exhibit.

If we were to ask the bank teller why he/she obeyed the robber's command and handed over the money, we might be told that having considered the likely conse-

quences of obeying or disobeying, the teller had made a "rational decision" and "chose" to avoid the risk of death, by obeying the command.

Presumably, the *law* would conclude that the teller's "choice" was coerced, because the teller's "will" had been overborne by the threat of physical harm.[8] Behavioral science would agree that the teller's choice was coerced. However, behavioral science would not posit that the pistol point command had overborne the teller's "will." Rather, behavioral science would simply say the choice was coerced in the sense that the overwhelming number of people placed in that circumstance would engage in the same behavior the teller did. This simply means that most people would agree with the teller that the likely consequence of obeying the command is more desirable than the likely consequence of disobeying.

There is no general concept in behavioral science that defines coercion in terms of some supposed inner state of the person. Coercion (or constraint) is a feature of the *external* environment, measurable by the presence of actual physical constraints, or inferred by the constricted range of behavior that most people show in that environment.

When measuring coercion in this statistical sense, psychologists and other behavioral scientists can infer the *degree* of coercion of a particular stimulus by measuring how much that stimulus affects the range of behaviors people generally show. When an apparently healthy male beggar asks for money, a few people give a little, a few give more, and most simply walk on. Begging, then, is not ordinarily very coercive. There are circumstances, however, in which begging can be very coercive. For example, if the beggar is an emaciated and inadequately clothed seven year old girl, begging for money for food or lodging on a freezing winter night, most of the same

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[8] On these facts, no state would prosecute the teller as an accomplice.

people who ignored the healthy male beggar's request would probably provide some assistance to the young girl. Should this happen, the givers would be "coerced," not because they fear physical harm to themselves if they ignore the request, but because ignoring the current stimulus event (the request of a helpless young girl), in the context of the antecedent circumstances and reinforcement histories in their lives, would lead to aversive consequences, experienced as subjective feelings of guilt, shame or heartlessness.

The point of this example is simply to show that "coercion," from a behavioral science perspective, does not depend upon or imply force or the threat of physical harm. The threat of physical harm is particularly coercive only because the antecedent circumstances in *most* people's lives cause them to avoid physical harm whenever possible. For example, when a mugger asks for money with a knife at the victim's throat, most people give it.[9] Armed mugging is thus quite coercive. From the scientific point of view, the difference between the average response to a male beggar and the average response to an armed mugger is not attributable to the effects of each circumstance on an entity called "will." It is simply a question of empirical evidence about the range of responses typically shown in the two circumstances.

B. Cognitive Capacity

Psychologists and other behavioral scientists can speak of cognitive capacity (and terms such as "rationality" or "rational intellect") more meaningfully than they can speak of "volitional" capacity (or terms such as "free will" or "choice"). Human behavior is seen to occur at any point in time as a result of a chain of processes that

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[9] It can be expected that a group of 100 "masochists," or of 100 people actively contemplating suicide, would be less likely to heed the mugger's command than would a group of 100 "normal" people. This simply means that the antecedent circumstances in the lives of the masochistic or suicidal people have caused them to view pain or the risk of death differently from most people.

begins with the impact of an external stimulus, followed by the processing of that information by the senses and the central nervous system, the programming of responses, and the execution of those responses. The total system involved is very complex, and it may become physically defective at many points in the chain. A large number of disease and injury conditions may impair the functioning of the system so that stimuli will be processed and actions executed in ways that would not have happened had the system been fully normal and intact. Various kinds of retardation, brain damage, toxic conditions, metabolic disorders, infections of the nervous system, and so on, may impair the system in this way.

Where there is clear evidence that such a physical condition exists, the behavioral scientist is generally on firm ground in concluding that an individual's cognitive capacity is impaired, and therefore that his or her behavior may not be a product of "rationality" or a "rational intellect."

A physical defect in the cognitive system limits the ability of that system to process and respond normally to stimuli in much the same way a physical constraint, such as confinement, limits the ability of the organism to engage in a wide range of behaviors. Just as a physical constraint necessarily restricts the range of behaviors open to all people subject to that constraint, regardless of their antecedent experiences, so too does a physical defect in the cognitive system necessarily restrict the ability of that system to process and respond to stimuli in a statistically "normal" way.

But if scientists consider cognitive capacity or "rational intellect" in the context of a psychosis that does not yet have a known or clear physical cause, they have to rely on statistical measurements, analogous to the measurements they use to determine whether a nonphysical restraint is or is not coercive. Specifically, they must use behavioral tests or measures of memory, judgment, concept formation, and the like. If those tests con-

sistently show that those abilities are impaired in people validly diagnosed as paranoid schizophrenics, or in people who obey command hallucinations, then they can infer, even absent clear physical causes, that normal cognitive processing is likely to be impaired in such people. If those tests do not consistently show such impairment, then they must conclude that there is no necessary correlation between paranoid schizophrenia or command hallucinations and cognitive impairment.

II. FROM A BEHAVIORAL SCIENCE PERSPECTIVE, THE AVAILABLE EVIDENCE WARRANTS AND SUPPORTS THE PSYCHIATRIC OPINION THAT RESPONDENT'S COGNITIVE CAPACITY WAS NOT IMPAIRED.

Respondent had previously been diagnosed as suffering from paranoid schizophrenia, and was so diagnosed by Jeffrey Metzner, M.D., the psychiatrist whose conclusions concerning respondent were adopted by the trial court.[10] Accordingly, the first question *amicus* will examine is whether persons suffering from paranoid schizophrenia are *necessarily* suffering cognitive impairment.[11] This is a complex question. By definition, the paranoid type is a schizophrenic disorder "dominated by one or more of the

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[10] See the Psychiatric Examination Report, dated September 22, 1983, of Jeffrey Metzner, M.D. (hereafter "Report") at 7. This Report was incorporated into the trial court's findings of fact. See the Transcript of the Hearing held on May 25, 1984 (hereafter "Transcript") at 85. Using the Nomenclature of the AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. 1980) (hereafter, "DSM-III"), Dr. Metzner diagnosed respondent under DSM-III category 295.34 as suffering from schizophrenic reaction, paranoid type. The first three digits (*i.e.*, "295") indicate schizophrenic disorder. The fourth digit (*i.e.*, "3") indicates paranoid type. The fifth digit (*i.e.*, "4") indicates that the course of the disorder is chronic, with acute exacerbation. DSM-III at 181-193.

[11] The question is not whether paranoid schizophrenics *may* be suffering cognitive impairment. Of course they may. But persons who are free of any mental disorder may also, for other reasons, suffer cognitive impairment.

following: (1) persecutory delusions, (2) grandiose delusions, (3) delusional jealousy, (4) hallucinations with persecutory or grandiose content." DSM-III at 191.[12]

There is no indication in the materials available to *amicus*, including Dr. Metzner's Report, that respondent suffered from persecutory delusions, from delusional jealousy, or from hallucinations with persecutory content, but there is some indication that respondent suffered from grandiose delusions, or from hallucinations with grandiose content.[13] Assuming that respondent was correctly diagnosed, the question is whether persons suffering from delusions or hallucinations (particularly from grandiose delusions or from hallucinations with grandiose content), will *necessarily* show impairment of their cognitive capacity.

"Cognitive capacity," and "rational intellect" are broad and imprecisely defined concepts. From the behavioral science perspective, cognitive capacity includes the capacity to perceive and record or encode information from an external stimulus, the capacity to store that information (both short term and long term memory), the capacity to retrieve or recall that information, the capacity to program or process that information and relate it to

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[12] Hallucinations are reported sensory perceptions without external stimulation of the relevant sensory organ. Delusions are false personal beliefs based on incorrect inferences about external reality that are maintained despite incontrovertible proof to the contrary. DSM-III at 356, 359. *See* L. ULLMAN & L. KRASNER, A PSYCHOLOGICAL APPROACH TO ABNORMAL BEHAVIOR 359 (1969).

[13] Respondent explained that because God is his Father "it's like I'm Jesus Christ . . . Jesus was a person . . . I was Jesus back then . . . but now I'm Barry Connelly . . . . it's like reincarnation." Report at 5. Respondent also described hearing the voice of God speak personally to him on many occasions, going back several years. Report at 3-6. With one exception (essentially, incoherence or markedly illogical thinking associated with blunted, flat or inappropriate affect, or with catatonic or other grossly disorganized behavior—see DSM-III at 188-189), the presence of delusions or hallucinations is also required for the general diagnosis of schizophrenic disorder. See DSM-III at 188.

other information, and the capacity to use that information in regulating behaviors.[14] Depending on which aspect of cognitive capacity is being examined, a particular delusion or hallucination may have a substantial effect, or no effect.

Of course, almost by definition, the presence of hallucinations (though not necessarily delusions) implies the possibility of some impairment of cognitive capacity, particularly with respect to perception. Most behavioral scientists regard hallucinations of external voices (including the voice of God) as the hallucinator's misattribution to an external source of what are really the inner thoughts and images of the hallucinator.[15] Indeed, the most widely recognized cognitive impairment associated with auditory hallucinations in paranoid schizophrenics is their failure or inability to perceive that the voices (and commands) they attribute to an external source are, in reality, expressions of their own wishes, thoughts and imagery. Heilbrun, *Impaired Recognition of Self-Expressed Thought in Patients With Auditory Hallucinations*, 89 J. ABNORMAL PSYCHOLOGY 728 (1980); Mintz & Alpert, *Imagery Vividness, Reality Testing, and Schizophrenic Hallucinations*, 79 J. ABNORMAL PSYCHOLOGY 310 (1972).

The assumption that hallucinators misperceive internal stimuli as originating in an external source is subject to an important qualification that is arguably relevant to this case. Empirical research suggests that schizophrenic hallucinators tend to be poorer at distinguishing between metaphorical and literal language than non-hallucinators. This is so whether the language originates, in fact, from an external source (for example, a friend or therapist), or from the individual. This fact raises the possibility that some of what scientists view as the misperception or misattribution of the source of a command may simply

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[14] *E.g.*, George & Neufeld, *Cognition and Symptomatology in Schizophrenia*, 11 SCHIZOPHRENIA BULLETIN 264 (1985).

[15] George & Neufeld, *supra* n.14, at 269.

be a function of constricted language skills, *i.e.*, that individuals mean to convey metaphorical statements, but confuse metaphor with literal usage, and end up expressing themselves as if they believed in the literal truth of what they meant to express metaphorically. Miller, Johnson & Richmond, *Auditory Hallucinations and Descriptive Language Skills*, 3 J. PSYCHIATRIC RESEARCH 43 (1965). Thus, when an individual says "God told me to confess," that statement could reflect the individual's misperception and misattribution of an internal stimulus, or it could simply reflect the individual's inability to speak in metaphorical or non-literal language. If the latter, the individual's perceptions may actually be intact. The individual may understand the internal source of the thought he or she is expressing, but may be unable to express that understanding precisely. Thus, the statement "God told me to confess" may only reflect the individual's inability to say "My understanding of what God would want me to do is to confess," or "Given my religious beliefs, I should confess," or "My conscience and feelings of guilt are bothering me so much that I have to confess."

It is impossible to determine from the information available to *amicus* whether respondent's statements concerning God's commands to confess indicated impaired ability to distinguish between internal and external stimuli, or only impaired ability to express himself precisely. This distinction was apparently not explored by Dr. Metzner.

But even if this aspect of cognitive capacity—the ability to distinguish between internal and external stimuli—is always or almost always impaired in individuals experiencing auditory hallucinations, it does not follow that other aspects of cognitive capacity are similarly impaired. We must still examine whether the capacity of the hallucinator to store, retrieve, process and use the misperceived information is necessarily impaired, and whether the capacity of the hallucinator to perceive, store, retrieve, process and use *other* information actually received from external sources (for example, from police

officers), is necessarily impaired. And we must examine whether the cognitive capacity of persons experiencing delusions, but not hallucinations, is necessarily impaired.[16]

The professional literature on the issue of general cognitive impairment in schizophrenia is massive. Many findings are contradictory or unreliable, often because of methodological flaws. Recognizing that the subject is too vast and too complex to be treated comprehensively here, and limiting our analysis to those studies that are methodologically sound and directly related to the particular issues of cognitive capacity presented by the facts of this case, *amicus* believes the following is a fair general summary of the relevant literature:

(a) *There is no necessary correlation between delusions and cognitive impairment.* Delusions of various kinds occur in association with a very large number of medical and psychiatric disorders. Maher & Ross, *Delusions*, in COMPREHENSIVE HANDBOOK OF PSYCHOPATHOLOGY 383 (Adams & Sutker eds. 1984). More than 70 different disorders, including renal malfunction, malaria, typhus and substance abuse, may be accompanied by delusions. *Id.* As Maher & Ross make clear, delusions occur quite often in disorders in which there is no independent reason to conclude that the patient is suffering from any cognitive impairment. *Id.* at 383-409. Thus, the presence of a delusion does not necessarily imply cognitive impairment. Indeed, "the mere fact that delusions are discerned in a clinical picture tells the diagnostician almost nothing about the probable pathology present in the case." *Id.* at 398.

(b) *There is no necessary correlation between the presence of delusions and incapacity to reason logically.* "Experimental studies have demonstrated that no difference

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[16] It is difficult to maintain the distinction between hallucinations and delusions in the circumstances of this case. Although respondent arguably was suffering from a grandiose delusion (that he was Jesus Christ—*see* Metzner Report at 5), that delusion was intimately associated with his repeated auditory hallucinations that God was speaking personally to him.

in ability to reason logically exists between delusional patients and others." Maher & Ross, *supra* at 401. *See also* Nims, *Logical Reasoning in Schizophrenia: The Von Domarus Principle*, 20 DISSERTATION ABSTRACT 383 (July 1959) (unpublished doctoral dissertation, U. So. Cal.); Williams, *Deductive Reasoning in Schizophrenia*, 69 J. ABNORMAL & SOCIAL PSYCHOLOGY 47 (1964).

(c) *There is no necessary correlation between hallucinations and gross impairment of reality testing.* The existence of an hallucination does not necessarily imply that the hallucinator is psychotic or is suffering from gross impairment of reality testing. Indeed, the DSM-III definition of hallucination expressly provides that "hallucinations indicate a psychotic disturbance *only* when they are associated with gross impairment in reality testing. . . ." DSM-III at 360 (emphasis added). Actually, a severely disorganized person would think the voices were real, and would not be aware that they were hallucinations. Thus, "the fact that the schizophrenic can answer the question [whether he is experiencing hallucinations] appropriately and accurately despite its semantic implications is an indication of his relatively intact cognitive functioning."[17] Respondent apparently acknowledged during his interview with Dr. Metzner that he had experienced both auditory and visual hallucinations. Metzner Report at 3. Furthermore, although Dr. Metzner's Report is not entirely clear on this point, respondent apparently understood that the voices were sufficiently unlike real-world phenomena that the police would not believe him, but doctors would.[18]

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[17] Robins, *Pitfalls in Questioning Patients About Auditory Hallucinations*, S.A. MEDICAL JOURNAL 2349, 2350 (1973). As Robins notes: "To the truly hallucinated patient, the 'voices' are ingredients of his perceptual reality, and he should no more specifically admit them than the normal person would the voices he hears over the radio." *Id.* at 2349-2350.

[18] Metzner Report at 6: "Mr. Connelly explained that he did not relate many details of the alleged crime to the police because he felt they would not believe him. [But] 'a doctor . . . a doctor would understand the voices. . . .'"

(d) *There is no necessary correlation between hallucinations and sub-average intelligence.* There is some evidence that there are slight differences from the norm tending towards lower scores on intelligence tests in hallucinating patients, but the actual IQ levels exhibited by hallucinating schizophrenic patients are well within the normal range. Johnson & Miller, *Auditory Hallucinations and Intellectual Deficit*, 3 J. PSYCHIATRIC RESEARCH 37 (1965).[19]

(e) *There is no necessary correlation between paranoid schizophrenia and inability to judge external stimuli accurately.* The most precise method for studying whether individuals can identify external stimuli correctly is a technique in which the subject is required to identify whether a rapidly presented stimulus is or is not of a specified category. Such studies show that although the overall judgment accuracy of nonparanoid schizophrenics is significantly lower than that of nonschizophrenics, the overall judgment accuracy of paranoid schizophrenics is *not* significantly lower than that of nonschizophrenics. *E.g.*, Gillis & Blevens, *Sources of Judgmental Impairment in Paranoid and Nonparanoid Schizophrenics*, 87 J. ABNORMAL PSYCHOLOGY 587-596 (1978).[20] Thus, at least with respect to external stimuli that are not closely associated with the individual's delusions, paranoid schizophrenics seem able to judge exter-

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[19] Johnson and Miller found, however, that schizophrenic patients who reported auditory hallucinations had scored significantly lower on IQ tests administered *prior* to the onset of schizophrenia than had schizophrenic patients who did *not* report auditory hallucinations. They interpreted that evidence "as indicating that there may be a cognitive predisposition for the eventual reporting of auditory hallucinations in schizophrenia." *Id.* at 41.

[20] These studies typically involve neutral and nonthreatening external stimuli (for example, bar graphs on a TV screen). It is conceivable, although *amicus* is not aware of studies to that effect, that the overall judgment accuracy of paranoid schizophrenics might be significantly lower than that of nonschizophrenics if the external stimuli were of a type the paranoid schizophrenics might incorporate into their delusions.

nal stimuli about as accurately as nonschizophrenics. There is no evidence (or suggestion) that respondent incorporated the police officers, or anything they said to him, into his delusional system. He apparently knew they were police officers, agents of the state, who would arrest and confine him if he confessed. See Metzner Report at 4-5. Accordingly, there is no basis for concluding, based solely on his diagnosis, that respondent was substantially impaired in his capacity to evaluate whatever the police officers said or did.[21]

Thus, the relevant literature does *not* warrant the inference that individuals diagnosed as paranoid schizophrenics, or who are experiencing delusions or hallucinations, are necessarily unable to understand what they are doing or the consequences of their acts. In general, there is no necessary correlation between those conditions and substantial impairment of cognitive capacity.[22]

Furthermore, *amicus* is aware of no studies or reports concluding that persons who obeyed *command* hallucinations were cognitively impaired. To the contrary, the available evidence suggests that individuals who *obeyed* command hallucinations were not at that time cognitively impaired.

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[21] The conclusion expressed in this point with respect to respondent would have to be modified if, for example, respondent had believed the police officers were priests, or angels, sent by God to hear his spiritual confession.

[22] This conclusion is consistent with the conclusions reached in closely related contexts. For example, a very recent study found that psychiatric patients as a class do not differ significantly from medical patients in their capacity to consent to research. Stanley, *et al.*, *Informed Consent and Competency in Psychiatric Research*, —— ARCH. GEN. PSYCHIATRY —— (in press; available from the Dept. of Psychiatry, Wayne State University). There were no significant differences between the two groups in their overall comprehension of information or the quality of their reasoning. *Id.* *See generally*, Morse, *A Preference For Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54 (1982).

The evidence, however, is surprisingly sparse. It can be said, based on the common and long-standing experience of clinicians, that command hallucinations are a relatively common phenomenon. But *amicus* has found no studies actually documenting the prevalence or incidence of command hallucinations in various populations. Mental health professionals recognize that "command hallucinations may be obeyed, at times creating danger for the individual or others." DSM-III at 183. But DSM-III does not have a separate diagnostic category or subcategory for command hallucinations, and clinicians are not requested or required to document the presence of "command" hallucinations (as opposed to other types of hallucinations) as part of the diagnostic process.

Thus, command hallucinations are *not* included in the prime diagnostic symptoms of schizophrenia, or of paranoid schizophrenia, presumably because command hallucinations can occur in connection with so many different mental disorders (and other conditions) that their presence is not critically essential to the diagnosis of any one of them.[23] In fact, the term "command hallucination" does not actually appear as a recognized technical term in professional dictionaries or encyclopedias.[24] The term is used, however, in published articles in the professional literature, and in this sense is a *de facto* technical term. It refers to auditory hallucinations in which the recipients hear a voice or voices commanding them to perform some action.

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[23] *E.g.*, SCHNEIDER, CLINICAL PSYCHOPATHOLOGY (Hamilton trans. 1959), and DSM-III at 188, discussing other types of auditory hallucinations that are significant in the diagnosis of schizophrenia (including hearing a voice or voices speaking the patient's thoughts aloud, hearing a voice or voices describing the patient's behavior or thoughts, and hearing voices discussing or arguing about the patient).

[24] The term does not occur, for example, in H. KAPLAN, A. FREEDMAN & B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (3rd ed. 1980); S. ARIETI, AMERICAN HANDBOOK OF PSYCHIATRY (2nd ed. 1974); or in the INTERNATIONAL ENCYCLOPEDIA OF PSYCHIATRY, PSYCHOLOGY, PSYCHO-ANALYSIS AND NEUROLOGY (1977).

Theoretically, there could be studies or reports (a) of persons who obeyed or disobeyed command hallucinations to injure other persons,[25] (b) of persons who obeyed or disobeyed command hallucinations to kill themselves,[26] (c) of persons who obeyed or disobeyed command hallucinations to injure themselves in some non-physical way (for example, as in respondent's case, by confessing to a crime), (d) of persons who disobeyed command hallucinations to mutilate themselves, or (e) of persons who obeyed command hallucinations to mutilate themselves.

In fact, however, in the English speaking literature since 1966, there are almost no studies or reports of categories (a) through (d), and only a few studies or reports of category (e). Accordingly, *amicus'* conclusions with respect to category (e) cases must be viewed as tentative and subject to revision, and extrapolations from category (e) to categories (a) through (d) should be viewed as even more tentative.

Perhaps because command hallucinations are apparently so common, and are so commonly disobeyed, the published literature focuses primarily on cases in which

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[25] Although the percentage of insanity defenses involving command hallucinations is not known, command hallucinations are not uncommon in that context. Indeed, should respondent ever stand trial, it is likely that he would raise such a defense. See Metzner Report at 1, quoting respondent's account of the homicide: " 'the voice told me to kill her and I did . . . I was standing in the alley . . . I waited . . . the voice said to kill her . . . the voice said you're hesitating again . . . that's your problem . . . kill her . . . something came over me . . . I did it . . . I ran away . . .' "

[26] Because the only method for determining the existence of a command hallucination is the hallucinator's report of that experience, it is not surprising that there are few studies or reports of individuals who obeyed command hallucinations to kill themselves. Only if the attempt was unsuccessful, or the individual had reported the command prior to obeying it, could there be such reports. For one such report, involving ten persons who had attempted suicide in response to hearing commands to do so, see van Praag, *CSF 5-HIAA And Suicide in Non-Depressed Schizophrenics*, 2 THE LANCET 977 (Oct. 1983).

the hallucinator obeys the command in a manner that is *prima facie* bizarre, or so unusual as to attract attention. These cases include predominantly acts of self-mutilation, usually castration, mutilation of the genitals, or enucleation of the eyes. One case involved hand amputation, and another mild laceration of the abdomen with a knife.[27]

The published reports describe a total of only 15 definite cases of individuals who mutiliated themselves, apparently in obedience to command hallucinations to do so. In *all* of these cases, the behavior was associated with expressed guilt, generally over sexual matters, and was accompanied by religious preoccupations. It appears that the self-injurious behavior was a form of self-punishment for "crimes" that are not usually punished by society.

Like these cases, respondent's confession was associated with expressed guilt, but the evidence available to *amicus* does not indicate whether there was a sexual component to that guilt. It is not known, for example, whether respondent raped or sexually molested the victim before he allegedly, by his account, killed her. Like these cases,

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[27] *E.g.*, R. SPITZER, A. SKODOL, M. GIBBON & J. WILLIAMS, DSM-III CASE BOOK (1st ed. 1981), 285 (case no. 185); Greilsheimer & Groves, *Male Genital Self-Mutilation*, 36 ARCH. GEN. PSYCHIATRY 441 (1979); Kushner, *Two Cases of Auto-Castration Due to Religious Delusions*, 40 BRITISH J. MED. PSYCHOLOGY 293, 297 (1967) ("In both cases the decision was taken well in advance, adequate preparations were made, and the deed was done in a state of clear consciousness. Neither of them feel any regret; and although patient 1 had sufficient insight to recognize that in 'the eyes of the world he would be mad,' he was not deterred."); Rosen & Hoffman, *Focal Suicide: Self-Enucleation by Two Young Psychotic Individuals*, 128 AM. J. PSYCHIATRY 123 (1972); MacClean & Robertson, *Self-Enucleation and Psychosis*, 33 ARCH. GEN. PSYCHIATRY 242 (1976); Shore, Anderson & Cutler, *Prediction of Self-Mutilation in Hospitalized Schizophrenics*, 135 AM. J. PSYCHIATRY 1406 (1978); Hall, Lawson & Wilson, *Command Hallucinations and Self-Amputation of the Penis and Hand During a First Psychotic Break*, 42 J. CLINICAL PSYCHIATRY 322 (1981).

respondent's confession was accompanied by religious preoccupations. Metzner Report at 5-6.[28] Unlike the typical self-mutilation case, however, respondent's "crime" was a real crime, punishable by society. Thus, unlike the self-mutilators, respondent did not have to mutilate himself to receive punishment for his crime. He simply had to confess, knowing that society would then punish him.[29]

In several of the 15 cases of self-mutilation, the investigators report that the act in obedience to the command appears to have been well planned, in advance of the act, and was committed without evidence of impaired cognition and with evidence of good reality contact.[30] Like these cases, respondent's confessions appear to have been well planned, and in advance. He traveled from Boston to Denver, located the scene of the crime, mailed all of his money to his mother (realizing that once he confessed he would "get locked up" and would not need

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[28] Surprisingly, the Report does not describe respondent's religious background or the relationship of that background, if any, to his delusions or behaviors.

[29] Only one of the reported cases involved the alternatives of confession or self-injury. An individual diagnosed as paranoid schizophrenic felt guilty about a "terrible sexual transgression" (he had attempted sexual intercourse with the family cat). He began to hear voices he did not recognize telling him to amputate his hand and his penis. He also considered other alternatives, including "turning himself in to the police." Eventually, he obeyed the voices. Three weeks later, a mental status examination showed "no gross disturbance of thought presentation or thought flow. . . ." Hall, Lawson & Wilson, *Command Hallucinations and Self-Amputation of the Penis and Hand During a First Psychotic Break*, 42 J. CLINICAL PSYCHIATRY 322 (1981).

[30] The remaining cases do not contain explicit statements that the individuals were cognitively intact, but they do not contain statements to the contrary, either. Although more precise descriptions would have been desirable, the impression gathered from these remaining reports is that the investigators would have reported evidence of substantial cognitive impairment had there been such evidence.

money, identified a uniformed police officer, and confessed.[31]

In view of these cases, the fact that respondent confessed in response to a command hallucination would not mean that respondent's cognitive capacity was necessarily impaired. Based on all of respondent's reported statements and actions at the time of his confessions, Dr. Metzner concluded that respondent's cognitive capacities were not, at that time, significantly impaired.[32] Although respondent's case is in several respects different from those reported here, the statistical pattern of relatively intact cognitive functioning reflected in those cases justifies and supports the clinical conclusion reached by Dr. Metzner.

III. FROM A BEHAVIORAL SCIENCE PERSPECTIVE, THE AVAILABLE EVIDENCE DOES NOT WARRANT THE PSYCHIATRIC OPINION THAT RESPONDENT'S VOLITIONAL CAPACITY WAS IMPAIRED.

Dr. Metzner testified that respondent's command hallucinations impaired his volitional capacity.[33] As noted *supra*, Point I, behavioral science does not use or rely upon the concepts of "volition" or "free will." Accordingly, Dr. Metzner was not testifying as a scientist when he testified that respondent's command hallucinations impaired his "volitional capacity." Furthermore, even if

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[31] Metzner Report at 4-5.

[32] Dr. Metzner testified as follows: "From what Mr. Connelly described to me, that was pretty consistent in my mind with a command hallucination, and that really affects his volitional abilities, that is, his ability to make free and rational choices. I think that his illness did not significantly impair his cognitive abilities. . . ." Transcript at 56. Later, when asked whether "the command hallucinations that you talked about affect volitional ability, but not cognitive," Dr. Metzner replied: "In Mr. Connelly's case, it was my opinion that it affected his volitional ability." Transcript at 67.

[33] Transcript at 56, 67. See note 32, *supra*.

Dr. Metzner only meant to testify that command hallucinations are, in a statistical sense, coercive, his testimony finds no support in the professional literature, and is contrary to clinical experience.

Although precise figures are not available, clinical experience suggests that the vast majority of people receiving command hallucinations do not obey them.[34] Probably less than one percent (1%) of all people who receive command hallucinations actually obey them, and the percentage is likely to be even lower for persons who receive command hallucinations to act in ways that are physically harmful to them, or otherwise contrary to their self-interests.

Thus, statistically, command hallucinations are not coercive. Accordingly, the only testimony a behavioral scientist could appropriately provide would be testimony, based on clinical experience, that it is statistically *unlikely* that respondent confessed because he had received command hallucinations to do so. Accordingly, Dr. Metzner's testimony on this point was directly contrary to the only evidence on which he could validly base a professional opinion.

IV. IN THE CIRCUMSTANCES OF THIS CASE, SUPPRESSION OF RESPONDENT'S PRECUSTODIAL AND POST-*MIRANDA* CONFESSIONS IS NOT NECESSARY TO FURTHER THE VALUES PROTECTED BY THE DUE PROCESS CLAUSE.

As a preliminary matter, *amicus* notes that the Fifth Amendment's privilege against self-incrimination does not apply in the circumstances of this case. That privilege applies only when the confession results from "official coercion." *See Oregon v. Elstad*, 105 S.Ct. 1285

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[34] Indeed, at least initially, respondent disobeyed God's commands. " 'God said he wanted me to walk up to them [the police] . . . tell them you killed somebody . . . that I wanted to turn myself in . . . *I wouldn't do it* . . . I was afraid . . . He [God] said buy a razor blade and kill myself . . . *I wouldn't do it* . . . I didn't want to kill myself . . . .' " Metzner Report at 4 (emphasis added).

(1985); *New York v. Quarles*, 104 S.Ct. 2626 (1984); *United States v. Washington*, 431 U.S. 181 (1977).[35] The trial court found that there was no official coercion or improper conduct of any kind, and respondent does not dispute that finding. Transcript at 85.

In evaluating the admissibility of confessions under the due process clause, the Court has "framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary' . . . ." *Miller v. Fenton*, 106 S.Ct. 445, 449 (1985), quoting *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).[36] But although the inquiry has been variously framed,[37] it is clear that the purpose of the inquiry is to ensure that the confession is trustworthy, and is not the product of "inquisitorial," [38] or

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[35] The Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion. . . . 'Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions'." *Elstad*, 105 S.Ct. at 1291, quoting *United States v. Washington*, 431 U.S. at 187 (other citations omitted). *But see In re Gault*, 387 U.S. 1, 55 (1967) ("[T]he greatest care must be taken to assure that the admission [is] voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent *fantasy*, fright or despair.") (emphasis added, footnote omitted).

[36] *Miranda* used a similar due process analysis to determine the validity of *Miranda* waivers. 384 U.S. at 475 ("provided the waiver is made voluntarily, knowingly and intelligently."). *See* also, *Moran v. Burbine*, —— U.S. —— (No. 84-1485, Slip op., March 10, 1986), at 7; and *Fare v. Michael C.*, 442 U.S. 707 (1979). *See generally* T. GRISSO, EVALUATING COMPETENCIES 113-155 (1986).

[37] *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) (whether the suspect's "will was simply overborne"); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (whether the suspect had the "capacity for self-determination" or the ability to make "an essentially free and unconstrained choice"); *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960) (whether the suspect's statements were "the product of a rational intellect and a free will").

[38] *Miller v. Fenton*, 106 S.Ct. at 449, *citing Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

otheriwse improper, official conduct. *See Jackson v. Denno*, 378 U.S. 368, 384-86 (1964); *Blackburn v. Alabama*, 361 U.S. at 206-07. The due process clause requires that confessions be trustworthy and reliable because it would offend our sense of fundamental fairness to convict people of crimes they did not actually commit, even if their confessions were not the result of improper official conduct. Similarly, confessions that are extracted by means of improper official conduct will be suppressed even when "independent corroborating evidence [leaves] little doubt of the truth of what the defendant [has] confessed." *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). Although these are distinct and important values, neither is implicated by the facts of this case.

The reliability of a confession in response to a command hallucination would certainly be an issue in many cases, because at least some people who receive command hallucinations to confess might acknowledge guilt falsely.[39] But respondent's counsel appears to have conceded "the truthfulness and veracity of [the] statements made [by respondent] to the police." Transcript at 78-A.[40] Respondent and his counsel have apparently never contended that respondent was innocent of the crime to which he confessed, and although *amicus* can find no specific confirmation in the record, the parties all seem to agree

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[39] The reliability concern is whether people who make self-incriminating statements in response to command hallucinations are likely to acknowledge guilt falsely: "'[U]nder certain stresses a person, especially one of defective mentality or peculiar temperament, . . . [may find] that the untrue acknowledgement of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.'" *In re Gault*, 387 U.S. at 44-45, *quoting* 3 Wigmore, Evidence § 822 (3d ed. 1940).

[40] Respondent's Brief In Opposition To Petition For Writ of Certiorari, at 2, states that "Mr. Connelly identified the girl he had killed as Mary Anne Junta and later took detectives to the location where he had killed her and left the body."

that the place where respondent led the police was, in fact, the place where the body of a young girl had been found, and appear to agree that the girl had been stabbed to death, as respondent claimed.

Similarly, as noted, respondent does not even claim that his confession was the result of improper official conduct.

Accordingly, at least in the circumstances of this case, suppression of respondent's precustodial and post-*Miranda* statements is not necessary in order to further either of the values protected by the due process clause in this context.

V. CLARIFICATION OF THE TESTS USED TO DETERMINE THE ADMISSIBILITY OF CONFESSIONS WOULD FACILITATE MEANINGFUL TESTIMONY BY PSYCHOLOGISTS AND OTHER BEHAVIORAL SCIENTISTS.

Although variously worded, the tests used by this Court to determine the admissibility of confessions all have a cognitive component and a volitional component. *See, e.g., Moran v. Burbine*, —— U.S. —— (No. 84-1485, Slip op., March 10, 1986), p. 7; and *Blackburn v. Alabama*, 361 U.S. at 208 ("rational intellect and free will"). *See also New York v. Quarles*, 104 S.Ct. 2626 (1984). From a behavioral science perspective, it would facilitate meaningful testimony if the cognitive component could be stated as whether the individual understood his rights and understood the consequences of waiving them, and if the volitional component could be stated as whether the pressures to which the individual was subjected would cause most individuals in the defendant's circumstances to confess.

It would also be helpful to clarify whether the legally relevant pressures are limited to official pressures, or would also include, for example, a threat from a friend to turn the individual in if the individual does not con-

fess, a statement from the individual's priest or religious advisor that if the individual does not confess he or she will go to hell, or a threat from a relative to disinherit the individual, or inflict severe physical punishment on the individual, if the individual does not confess.

Finally, because it is difficult for psychologists and other behavioral scientists to discuss "volitional" behavior in other than statistical terms, lower courts should be precluded from requiring such experts to express opinions on the ultimate question of whether the volitional capacity of a particular individual was or was not impaired.[41]

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to reverse the judgment of the Supreme Court of Colorado.

Respectfully submitted,

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[41] *E.g.*, Bersoff, *Psychologists and the Judicial System: Broader Perspectives*, 10 L. & HUMAN BEHAV. —— (in press, June 1986); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099 (1978); McQueen, *The Psychologist To The Witness Stand*, 32 CLINICAL PSYCHOLOGIST 4 (1979); and AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE (1982).